IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK ex rel. Attorney General DENNIS C. VACCO, et al., Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' OPPOSITION TO MICROSOFT'S MOTION TO STRIKE THE GOVERNMENT'S DEPOSITION DESIGNATIONS

The Plaintiffs' designations of various admissions in depositions of Microsoft employees and designations of portions of selected depositions of third party witnesses are appropriate, and Microsoft's motion to strike certain of those designations should be denied. Microsoft's argument ignores the plain language of Pretrial Order No. 2 and the Federal Rules of Evidence relating to party admissions and deposition designations.

I. Admissions of Microsoft Employees

Any relevant statement by a Microsoft employee is admissible as an admission of a party

whether made in an e-mail message, a newspaper, or a sworn deposition; such a statement does not become less admissible because it is made under oath subject to cross-examination in a deposition as opposed to in a more informal way. *See*, Fed. R. Evid. 801(d)(2)(D) (an admission by a party-opponent is one offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship"). Pretrial Order No. 2 recognizes this obvious fact. The language of Paragraph 4 is clear; the restrictions and limitations stated in Paragraphs 4(a) - 4(e) apply only to deposition excerpts of third parties, and specifically do not apply to the use of deposition testimony "for purposes of proof of an admission by a party opponent or impeachment of a trial witness." (Pretrial Order No. 2, ¶4.)

A. *Mr. Gates' Deposition Is An Admission and Is Admissible*

As permitted by the Order, Plaintiffs previously designated the transcript and videotape of Bill Gates' deposition into the record as an admission by a party opponent. Mr. Gates is Chairman and CEO of Defendant Microsoft. All statements made by Mr. Gates relating to Microsoft are admissions under Rule 801(d)(2).

There is no basis for Microsoft's suggestion that offering admissions of Defendant's CEO should somehow reduce the number of trial witnesses Plaintiffs are entitled to call. Although Plaintiffs believe that there are substantial portions of Mr. Gates' deposition that are relevant, in response to Defendant's objections and in an attempt to reduce the time that playing Mr. Gates' deposition will take, Plaintiffs have significantly reduced their designations from Mr. Gates' deposition to those attached to this response. Plaintiffs' revised, limited designations in total represent only approximately eight and a half hours of Mr. Gates' almost three-day deposition.

B. *Designations of Admissions of Microsoft Employees Are Appropriate*

Microsoft's attempt to exclude designations from depositions of current Microsoft employees taken in the investigation leading up to this case, and in other cases and proceedings against Microsoft, again ignores the fact that statements by Microsoft's employees are party admissions regardless of the form such statements take. As Microsoft aptly points out in its motion, an "admission" is a "statement by a party's agent or servant." (Microsoft Motion at 3, citing Fed. R. Evid. 801(d)(2)(D).) Paragraph 4 of the Court's Pretrial Order No. 2 makes clear that the prior, sworn testimony of Microsoft employees, particularly from the investigation leading up to this case but also in related litigation, constitutes admissions of a party and should be admitted. All of the designated admissions are relevant to and probative of significant issues in this case. Consequently, the Court should deny Microsoft's request to suppress the admissions of its employees given in the lawsuits of *Caldera v. Microsoft* and *Sun v. Microsoft*, and in the depositions conducted by the government during the prefiling investigation.

II. Plaintiffs' Designation of Scott Vesey's Deposition Was Reasonable

Microsoft's claim that Plaintiffs have designated "nearly all" of Scott Vesey's deposition transcript for the record is simply wrong. In fact, Plaintiffs have carefully designated specific page and line numbers from Mr. Vesey's deposition. Indeed, the actual number of lines designated from the deposition accounts for less than 30% of the transcript. Given that significant portions of Mr. Vesey's testimony are highly relevant and strongly support Plaintiffs' case, and given that Microsoft had and exercised fully the ability to cross-examine Mr. Vesey, Plaintiffs' designation of limited portions of the deposition are reasonable and appropriate under Paragraph 4(b) of Pretrial Order No. 2. Moreover, Mr. Vesey's designated deposition excerpts will be relied on and corroborated by the direct testimony of at least one of Plaintiffs' trial witnesses.

Plaintiffs' exercise of their right to substitute another witness for Mr. Vesey on their final witness list does not preclude Plaintiffs from now designating limited, relevant excerpts of Mr. Vesey's transcript. And of course, the Court remains free to "disregard deposition testimony it deems immaterial, collateral, cumulative, or confusing." *See* Pretrial Order No. 2, ¶ 4(b).

III. Deposition Excerpts of Mr. Barrett and Ms. Reichal From Another Matter Are Admissible

The deposition testimony of Phillip Barrett and Stephanie Reichal taken in the *Caldera v. Microsoft* matter is admissible as former testimony under Federal Rules of Evidence 804(b)(1). Mr. Barrett and Ms. Reichal are former Microsoft employees living in the State of Washington. Microsoft is correct that Mr. Barrett and Ms. Reichal were not Microsoft employees at the time of their depositions, and their deposition designations should have been listed in Appendix C to Plaintiffs Final Pretrial Statement under the subheading "Designations of Deposition of 3rd Party Witnesses," rather than under "Admissions of Microsoft Employees or Representatives," as they were inadvertently listed.

Properly viewed as third-party designations, Mr. Barrett's and Ms. Reichal's deposition excerpts are nonetheless admissible under Rule 804(b)(1). Under Rule 804(b)(1), "Testimony given as a witness . . . in a deposition taken in compliance with law in the course of . . . another proceeding," is admissible as former testimony "if the party against whom the testimony is now offered, . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." In the *Caldera v. Microsoft* litigation, Microsoft had a full opportunity, and the same motive as here (Microsoft is the Defendant in that antitrust litigation), to cross-examine the witnesses in those depositions. Thus, because the testimony is relevant to the current matter and Microsoft had an opportunity to cross-examine both witnesses, the designations

should not be excluded.

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Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 23, 1998, a copy of the Plaintiffs' Opposition to Microsoft's Motion to Strike Deposition Designations was served by facsimile upon:

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